U.S. Department of Homeland Security
U. S. Citizenship and Immigration Services
Office of Administrative Appeals MS 2090
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: **NOV 18 2009**

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IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. Please refer to 8 C.F.R. § 103.5 for the specific requirements. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $585. Any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen, as required by 8 C.F.R. § 103.5(a)(1)(i).

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a producer of laser pattern tools. It seeks to employ the beneficiary permanently in the United States as an applications engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, which was certified by the Department of Labor (DOL). The Form ETA 750 indicates in Block 15 that a bachelor's degree or equivalent in physics, plus two years of experience, could serve as an alternate level of education and experience for the position.

The director determined that the Form ETA 750 failed to demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability and, therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree or an alien of exceptional ability. 8 C.F.R. § 204.5(k)(4). The director also determined that the petitioner failed to submit initial evidence establishing that it has the ability to pay the proffered wage or that the beneficiary has the necessary qualifications for the position. 8 C.F.R. § 204.5(g)(2); 8 C.F.R. § 204.5(k)(3)(i). The director denied the petition accordingly.

On appeal, counsel argues that, if classification as an advanced degree professional or alien of exceptional ability was not appropriate in this matter, U.S. Citizenship and Immigration Services (USCIS) should have considered the petition under the classification for professionals or skilled workers under section 203(b)(3)(A) of the Act, 8 U.S.C. § 1153(b)(3)(A). Counsel also argues that the director should have sent a request for evidence pertaining to deficiencies in the record concerning the petitioner's ability to pay the proffered wage, and the beneficiary's qualifications, prior to denying the petition.

The record shows that the appeal is properly filed and timely. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

Section 203(b)(2) of the Act also includes aliens "who because of their exceptional ability in the sciences, arts or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States." The regulation at 8 C.F.R. § 204.5(k)(2)

defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered."

Here, the Form I-140 was filed on June 27, 2007. On Part 2.d. of the Form I-140, the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability.

The AAO maintains plenary power to review each appeal on a *de novo* basis. *See Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g. Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal. On appeal, counsel submits a brief in which he argues that USCIS should have considered the petition under the classification for professionals or skilled workers under section 203(b)(3)(A) of the Act. Counsel also argues that the director should have sent a request for evidence pertaining to deficiencies in the record concerning the petitioner's ability to pay the proffered wage, and the beneficiary's qualifications, prior to denying the petition. However, counsel did not submit any additional evidence on appeal.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In this case, the job offer portion of the Form ETA 750 indicates that a bachelor's degree or equivalent in physics, plus two years of experience, could serve as an alternate level of education and experience for the position. Accordingly, the job offer portion of the Form ETA 750 does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability. However, the petitioner requested classification as a member of the professions holding an advanced degree or an alien of exceptional ability and attempted to change this request to that of a skilled worker or professional on appeal. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1988). In this matter, the appropriate remedy would be to file another petition with the proper fee and required documentation.

The evidence submitted does not establish that the Form ETA 750 requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed.

Furthermore, as noted by the director, the record is devoid of the necessary required initial evidence establishing that the petitioner has the ability to pay the proffered wage or that the beneficiary is qualified for the position. 8 C.F.R. § 204.5(g)(2); 8 C.F.R. § 204.5(k)(3)(i). The petitioner did not submit any of this missing evidence on appeal. If all required initial evidence is not submitted with the petition, or if the evidence does not establish eligibility, USCIS may in its discretion deny the

petition for this reason. 8 C.F.R. § 103.2(b)(8)(ii). In this matter, the director appropriately used his discretion to deny the petition for this additional reason.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.